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Chan Kwee Fong v Public Prosecutor

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COURT OF APPEAL (PUTRAJAYA) — CRIMINAL APPEAL NO T-05–48 OF 2005
LOW HOP BING, ZAINUN ALI AND ABDUL MALIK ISHAK JJCA
13 NOVEMBER 2009

C

Criminal Law — Murder — Defence — Intoxication — Accused's conduct immediately prior to and after commission of offence — Whether accused was conscious of his surroundings and knew what he was doing to be capable of forming intention under s 300(c) of the Penal Code — Penal Code s 85(2)(b) or 86(2)

D

Criminal Law — Murder — Defence — Sudden fight — Whether proved — Whether accused took advantage of deceased and acted in cruel and unusual manner — Penal Code s 300 Exception 4

E

Criminal Law — Murder — Defence of grave and sudden provocation — Test to be applied — Whether proved on balance of probabilities — Penal Code s 300 Exception 1

F

Criminal Law — Penal Code — s 302 — Murder — Appeal against conviction and sentence — Whether prosecution proved intention to kill under s 300(c) of the Penal Code — Penal Code s 300

G

On 16 August 2002, when Ng Wen Beng, the deceased and Chan Kwee Fong, the accused, had met at a coffee shop in Taman Sri Manir in Kuala Terengganu a fight had broken out between the two. The fight seemed to be about one Lee Kim Choo ('Choo') who had six months prior to the incident
H in the coffee shop, been the lover of the accused but who later became the lover of the deceased. According to Choo, on the night in question, the accused had invited her and the deceased to go to the coffee shop for a discussion. At the coffee shop, the accused had allegedly slapped Choo and then later stabbed the deceased four times. The deceased passed away on 17
I August 2002 at the Kuala Terengganu General Hospital ('the hospital') and the accused was charged with the offence of murder under s 302 of the Penal Code. At the trial, Choo testified that she saw the accused stab the deceased while they were both standing and facing each other. According to Choo, after the first stabbing the deceased had run to the rear of the shop and the

accused had given chase caught up with the deceased and stabbed him again from the back. Thereafter, the deceased had allegedly fallen and the accused had fled the scene. Choo not only saw the stabbing but was also able to draw the knife used by the accused to stab the deceased, which was tendered as an exhibit in the trial. The other eye witness called by the prosecution was the deceased's son who was also present at the coffee shop. He testified that he saw the accused and the deceased quarrelling and fighting with one another and that the deceased died because he was stabbed by the accused at the coffee shop. The doctor who attended to the deceased at the emergency ward of the hospital, testified that the deceased was bleeding from his chest, abdomen and thigh and suffering from excessive loss of blood. According to the doctor, emergency surgery was performed on the deceased but after the surgery his condition deteriorated and he passed away. According to the head of the forensic department who carried out the post-mortem on the deceased, the cause of death of the deceased was due to excessive loss of blood which caused him to suffer from hypovolemic shock. In the opinion of this witness the shock was caused by the cut to the internal iliac artery by a sharp weapon. In his evidence the doctor gave his opinion that the first three injuries were wounds that were inflicted on the deceased while he was facing the assailant while the fourth injury was inflicted while the deceased must have had his back to the assailant; that the injury caused to the artery had resulted in too much loss of blood; and that even though treatment was given by the hospital, the effect of the excessive blood loss was sufficient to cause the deceased's death. At the close of the prosecution case, the High Court found that the prosecution had succeeded in proving a prima facie case against the accused and called upon the accused to enter his defence. The High Court held that from the evidence of the two eyewitnesses, Choo and the deceased's son, the prosecution had established that the aggressor was the accused. The trial judge also treated both the doctor who first treated the deceased when he came into the hospital and the doctor who conducted the post-mortem as expert witnesses and accepted their opinion that the deceased had died from an excessive loss of blood caused by the cut to the main artery. The accused raised the defences of intoxication, provocation and sudden fight which were considered by the High Court. However, after the full trial the High Court found the accused guilty of murder and he was sentenced to death. This was the accused's appeal against that decision.

Held, dismissing the appeal:

(1) The trial judge was right in treating the two doctors who testified for the prosecution as expert witnesses. From the evidence of these expert witnesses, the first two elements of s 300(c) of the Penal Code, as to the presence of the bodily injuries on the deceased and the nature of those injuries, were satisfied. The third element of s 300(c) of the Penal Code,

which required proof that there was an intention to inflict those particular injuries on the deceased was provided by the evidence of the eyewitness Choo who testified that the aggressor was the accused and that the accused had first stabbed the deceased while the two were facing each other and then continued stabbing him when the deceased ran to the rear of the shop. Her evidence was also consistent with the evidence of the doctor who conducted the post-mortem. From the evidence given by Choo and the doctor it was clear that the second and fourth stab wounds inflicted on the deceased were sufficient in the ordinary course of nature to cause death. The serious injuries suffered by the deceased, particularly with the severance of the main artery, were ample evidence of an intention to kill (see paras 81–85).

(2) When the accused raised the defence of intoxication it could result in a complete acquittal or the charge of murder being reduced to culpable homicide not amounting to murder, or the court choosing to totally disregard the accused's intoxication to convict him of murder. In order to determine whether the defence of intoxication had been successfully raised it was necessary to consider the accused's conduct immediately prior to and after the commission of the offence. Although the accused alleged that he had been drinking beer and stout from about 12 noon to about 4.30pm on 16 August 2002 and that he was already drunk at that stage, he was able to recall many details of what occurred and walk home unaided to his house. He even recalled minute details as to what took place in the coffee shop before the fight broke out between him and the deceased. The fact that the trial judge had meticulously set out in great detail the conduct of the accused immediately prior to and after the commission of the offence also displayed an excellent judicial appreciation of the evidence. From the evidence it was clear that the accused was conscious of his surroundings and knew what he was doing to be capable of forming the intention under s 300(c) of the Penal Code. As such, he had failed to establish on the balance of probabilities the defence of intoxication as set out in ss 85(2)(b) or 86(2) of the Penal Code (see paras 87, 96, 102–109).

(3) From the testimony of the accused, the High Court was correct to find that none of the acts referred to by the accused were sufficient to constitute grave and sudden provocation and that even if the cumulative effect of those events had angered and provoked the accused there was a sufficient cooling period for him to regain his control. Under s 105 of the Evidence Act 1950, the accused had the burden of establishing grave and sudden provocation on a balance of probabilities and he had failed to discharge that burden (see paras 119–121)

(4) From the evidence it was clear that the accused had taken advantage of the deceased and had acted in a cruel and unusual manner. That being the case the defence of sudden fight must fail (see paras 127).

(5) The High Court was also correct in its conclusion that it was the accused who had caused the death of the deceased and not the alleged delay by the hospital in carrying out the emergency operation or any other reason (see para 128).

[Bahasa Malaysia summary

Pada 16 Ogos 2002, apabila Ng Wen Beng, si mati dan Chan Kwee Fong, tertuduh berjumpa di kedai kopi di Taman Sri Manir di Kuala Terengganu satu pergaduhan tercetus antara mereka. Pergaduhan itu sepertinya berkenaan Lee Kim Choo ('Choo') yang merupakan kekasih tertuduh enam bulan sebelum kejadian di kedai kopi tersebut tetapi kemudiannya menjadi kekasih si mati. Menurut Choo, pada malam kejadian, tertuduh telah menjemputnya dan si mati ke kedai kopi tersebut untuk berbincang. Di kedai kopi tersebut, tertuduh didakwa telah menampar Choo dan kemudiannya menikam si mati sebanyak empat kali. Si mati meninggal dunia pada 17 Ogos 2002 di Hospital Besar Kuala Terengganu ('hospital tersebut') dan tertuduh dituduh dengan kesalahan membunuh di bawah s 302 Kanun Keseksaan. Pada perbicaraan Choo memberi keterangan bahawa dia nampak tertuduh menikam si mati apabila mereka berdiri dan bersemuka antara satu sama lain. Menurut Choo, selepas tikaman pertama si mati telah melarikan diri ke tepi kedai dan tertuduh mengejarnya dan menikamnya dari belakang. Kemudian, si mati dikatakan telah rebah dan tertuduh melarikan diri. Choo bukan sahaja nampak kejadian tikam menikam itu malah boleh melukis pisau yang digunakan oleh tertuduh untuk menikam si mati, yang dimasukkan sebagai ekshibit dalam perbicaraan. Seorang lagi saksi yang dipanggil oleh pihak pendakwaan adalah anak lelaki si mati yang juga berada di kedai kopi tersebut. Dia memberi keterangan bahawa dia nampak tertuduh dan si mati bertengkar dan bergaduh dan si mati meninggal kerana ditikam oleh tertuduh di kedai kopi. Doktor yang merawat si mati di wad kecemasan di hospital tersebut memberi keterangan bahawa berlaku pendarahan daripada dada, abdomen dan paha si mati, dan dia kehilangan darah dengan banyaknya. Menurut doktor tersebut, pembedahan kecemasan telah dilakukan ke atas si mati tetapi selepas pembedahan tersebut, keadaannya semakin tenat dan dia meninggal dunia. Menurut ketua jabatan forensik yang menjalankan post mortem ke atas si mati, sebab kematian adalah kehilangan darah yang banyak yang mengakibatkannya mengalami renjatan hypovolemia. Pada pendapat saksi ini, renjatan tersebut diakibatkan oleh luka pada arteri ilium dalaman yang disebabkan oleh senjata tajam. Dalam keterangannya, doktor tersebut memberikan pandangannya bahawa tiga kecederaan yang pertama merupakan luka-luka yang diakibatkan kepada si

mati ketika dia bersemuka dengan penyerangnya manakala kecederaan keempat diakibatkan semasa si mati membelakangi penyerang; bahawa kecederaan pada arteri tersebut mengakibatkan pendarahan yang banyak; dan walaupun rawatan diberikan di hospital tersebut, kesan pendarahan yang terlampau banyak adalah mencukupi untuk mengakibatkan kematian si mati. Pada penutup kes pendakwaan, Mahkamah Tinggi memutuskan bahawa pihak pendakwaan berjaya membuktikan kes prima facie terhadap tertuduh dan memerintahkan tertuduh membela diri. Mahkamah Tinggi memutuskan bahawa melalui keterangan dua orang saksi, Choo dan anak si mati, pihak pendakwaan berjaya membuktikan bahawa penyerang itu adalah tertuduh. Hakim perbicaraan juga menganggap kedua-dua doktor yang memberikan rawatan pertama kepada si mati ketika dia dimasukkan ke hospital dan juga doktor yang melakukan post mortem sebagai saksi-saksi pakar dan menerima pendapat-pendapat mereka bahawa si mati meninggal akibat daripada pendarahan yang terlampau yang diakibatkan oleh luka pada arteri utama. Tertuduh membangkitkan pembelaan kemabukan, bangkitan marah dan pergaduhan secara tiba-tiba yang mana dipertimbangkan oleh Mahkamah Tinggi. Walau bagaimanapun, selepas perbicaraan penuh Mahkamah Tinggi mendapati bahawa tertuduh bersalah atas kesalahan membunuh dan dia dihukum dengan hukuman mati. Ini merupakan rayuan tertuduh terhadap keputusan tersebut.

Diputuskan, menolak rayuan:

(1) Hakim perbicaraan membuat keputusan yang tepat apabila menganggap kedua-dua doktor yang memberi keterangan bagi pihak pendakwaan sebagai saksi-saksi pakar. Melalui keterangan saksi-saksi pakar tersebut, dua elemen pertama s 300(c) Kanun Keseksaan, iaitu ada kecederaan pada badan si mati dan juga sifat kecederaan tersebut, adalah dipenuhi. Elemen ketiga s 300(c) Kanun Keseksaan, yang memerlukan bukti bahawa adanya niat untuk menyebabkan kecederaan tersebut ke atas si mati didatangkan dengan keterangan saksi-saksi Choo yang memberi keterangan bahawa penyerang adalah tertuduh dan bahawa tertuduh mulanya menikam si mati ketika mereka berdua bersemuka dan kemudian menikamnya apabila si mati melarikan diri ke tepi kedai tersebut. Keterangannya juga konsisten dengan keterangan doktor yang menjalankan post mortem. Daripada keterangan yang diberi oleh Choo dan doktor tersebut adalah jelas bahawa kecederaan tikaman kedua dan keempat pada si mati adalah mencukupi secara semula jadinya mengakibatkan kematian. Kecederaan teruk yang dialami oleh si mati, terutamanya arteri utama yang putus, adalah keterangan yang mencukupi bagi niat untuk membunuh (lihat perenggan 81–85).

(2) Apabila tertuduh membangkitkan pembelaan kemabukan, akibatnya, akan membebaskan tertuduh atau tuduhan membunuh akan dikurangkan kepada homisid salah tak terjumlah membunuh, atau mahkamah memilih untuk langsung tidak mengambilkira kemabukan tertuduh untuk mensabitkannya atas kesalahan membunuh. Untuk menentukan sama ada pembelaan kemabukan telah berjaya dibangkitkan, adalah perlu untuk mempertimbangkan perilaku tertuduh sejurus sebelum dan selepas melakukan kesalahan tersebut. Walaupun tertuduh mendakwa bahawa dia minum bir dan staut dari jam kira-kira 12 tengah hari hingga jam kira-kira 4.30 petang pada 16 Ogos 2002 dan dia sudah mabuk pada ketika itu, dia boleh mengingati butiran apa yang berlaku dan pulang ke rumah tanpa bantuan sesiapapun. Dia juga ingat akan butiran terperinci tentang apa yang berlaku di kedai kopi tersebut sebelum pergaduhan berlaku antaranya dan si mati. Fakta bahawa hakim perbicaraan menyatakan dengan teliti perilaku tertuduh sejurus sebelum dan selepas melakukan kesalahan tersebut juga menunjukkan pengamatan mendalam akan keterangan. Daripada keterangan, adalah jelas bahawa tertuduh sedar apa yang berlaku di sekelilingnya dan maklum bahawa apa yang dilakukannya boleh membentuk niat di bawah s 300(c) Kanun Keseksaan. Maka, dia gagal membuktikan atas imbangan kebarangkalian pembelaan kemabukan seperti dalam ss 85(2)(b) atau 86(2) Kanun Keseksaan (lihat perenggan 87, 96, 102–109).

(3) Menerusi keterangan tertuduh, Mahkamah Tinggi membuat keputusan tepat bahawa tiada satu pun kelakuan-kelakuan yang dikatakan oleh tertuduh mencukupi untuk membentuk bangkitan marah besar dan mengejut dan bahawa jika pun kesan kumulatif kejadian-kejadian tersebut memberangkan atau menaikkan marah tertuduh, ada tempoh penenang bagi tertuduh untuk mengawal diri. Di bawah s 105 Akta Keterangan 1950, tertuduh perlu membuktikan bangkitan marah besar dan mengejut atas imbangan kebarangkalian dan dia gagal membuktikannya (lihat perenggan 119–121).

(4) Daripada keterangan adalah jelas bahawa tertuduh telah mengambil kesempatan atas si mati dan telah bertindak kejam dan luar biasa. Oleh itu, pembelaan pergaduhan secara tiba-tiba tidak terpakai (lihat perenggan 127).

(5) Mahkamah Tinggi juga membuat kesimpulan tepat bahawa tertuduhlah yang menyebabkan kematian si mati dan bukannya dakwaan kelewatan pihak hospital menjalankan pembedahan kecemasan atau sebab-sebab lain (lihat perenggan 128).]

Notes

For a case on defence, see 4 *Mallal's Digest* (4th Ed, 2005 Reissue) para 1157.

A For cases on s 302, see 4 *Mallal's Digest* (4th Ed, 2005 Reissue) paras 1237–1238.

Cases referred to

Aladin v PP [1964] MLJ 345, FC (refd)
B *Anda v State of Rajasthan* AIR 1966 SC 148 (refd)
Che Omar bin Mohd Akhir v PP [1999] 2 MLJ 689, CA (refd)
Chong Teng v PP [1960] MLJ 153, CA (refd)
Davie v Magistrates of Edinburgh 1953 SC 34 (refd)
Fenwick v Bell (1844) 174 ER; 1 Carr & Kir 312 (refd)
C *Francis Antonysamy v PP* [2005] 3 MLJ 389; [2005] 2 CLJ 481, FC (refd)
Herchun Singh & Ors v PP [1969] 2 MLJ 209, FC (refd)
Indra Wijaya Ibrahim v PP [1995] 2 SLR 442, CA (refd)
Joseph Crosfield & Sons Ltd v Techno-Chemical Laboratories Ltd (1913) 29 TLR 378 (refd)
D *Joyce v Yeomans* [1981] 1 WLR 549, CA (refd)
Juma'at bin Samad v PP [1993] 3 SLR 338, HC (refd)
Kenneth Fook Mun Lee v PP [2007] 2 MLJ 130; [2006] 4 CLJ 359, FC (refd)
Liew Koh Tai v PP [1965] 1 MLJ 54, FC (refd)
Lim Chin Chong v PP [1998] 2 SLR 794, CA (refd)
E *Lorensus Tukan v PP* [1988] 1 MLJ 251, SC (refd)
Malton v Nesbit & Anor (1824) 171 ER 1106; C & P 70 (refd)
Metropolitan Properties Co (FGC) Ltd v Lannon & Ors; R v London Rent Assessment Panel Committee ex parte Metropolitan Properties Co (FGC) Ltd [1968] 1 All ER 354, QBD (refd)
F *Nanavati v State of Maharashtra* AIR 1962 SC 605 (refd)
PP v Abdul Razak bin Dalek [2007] 2 MLJ 255, HC (refd)
PP v Awang Raduan bin Awang Bol [1998] 5 MLJ 460, HC (refd)
PP v Chan Kim Choi [1989] 1 MLJ 404, HC (refd)
PP v Lim Eng Kiat [1995] 1 MLJ 625, HC (refd)
G *PP v Mahfar bin Sairan* [2000] 4 MLJ 791, HC (refd)
R v Hipson (1969) 112 Sol J 945, CA (refd)
R v Lanfear [1968] 1 All ER 683, CA (refd)
R v Smith (John) [1974] 1 All ER 376, CA (refd)
Reg v Frances (1850–51) 4 Coxs CC 57 (refd)
H *Reg v Govinda* [1876–77] ILR 1 Bombay 342
Rex v John Wright (1821) 168 ER 895; Russ & Ry 456 (refd)
Rex v Searle (1831) 174 ER ; 1 Mood & R 75 (refd)
Stevens (formerly Ludlow) v Simons & Ors [1988] CLY 1161, CA (refd)
Suradet & Ors v PP [1993] 3 SLR 265, CA (refd)
I *Tan Hung Song v Rex* [1951] MLJ 181, CA (refd)
Teo Boon Ann v PP [1989] 2 MLJ 321, CA (refd)
Thomas Mason (1911–12) 7 Cr App R 67, CA (refd)
Virsa Singh v State of Punjab AIR 1958 SC 465 (folld)
Wong Chop Saow v PP [1965] 1 MLJ 247, HC (refd)

Wong Swee Chin v PP [1981] 1 MLJ 212, FC (refd)

Legislation referred to

Criminal Procedure Code ss 347, 348
Evidence Act 1950 ss 45, 105
Penal Code ss 84, 85, 85(2)(a), (b), 86, 86(2), (2)(a), (b), 300, 300(a), (b), (c), (d), Exceptions 1, 4, 302

Appeal from: Criminal Trial No: 45–1 of 2003 (High Court, Kuala Terengganu)

Jagjit Singh (Jagjit Singh & Co) for the appellant.
Awang Armadajaya bin Awang Mahmud (Deputy Public Prosecutor, Attorney General's Chambers) for the respondent.

Abdul Malik Ishak JCA:

THE APPEAL

[1] The appellant ('the accused') was charged with an offence of murdering Ng Weng Beng, NRIC No 580307–11–5261, on 16 August 2002 at about 8.30pm at shop No 334–335, Taman Sri Manir, in the district of Kuala Terengganu, in the State of Terengganu, an offence punishable under s 302 of the Penal Code.

[2] After a full trial, the accused was found guilty by the High Court of murder, and he was sentenced to death. Aggrieved by the decision of the High Court, the accused filed an appeal to this court against his conviction and sentence.

THE FACTS

[3] An eye witness by the name of Lee Kim Choo ('SP8') gave evidence for the prosecution. SP8 was a canteen operator and she resided at No 266, Taman Sri Manir, Kuala Terengganu. She did not know the real name of the deceased but she knew him by the name of 'Ah Meng'. She admitted that the deceased was her friend. She also admitted that she knew the accused and called him by the name of 'Ah Fong'. She testified that she knew the accused for approximately four years and that the accused was single.

[4] SP8 identified Ng Ka Chun ('SP9') as the son of the deceased. According to SP8, the deceased and SP9 stayed in a house which was located in the same row as SP8's house.

A **[5]** On that fateful day — it was on 16 August 2002 at about 8.30pm, SP8 was in her house when the deceased came and invited her to go to a coffee shop which was about 200 meters from her house. The deceased told her that the accused wanted to meet her. The accused also told the deceased to go to the coffee shop. SP8 drove to the coffee shop while the deceased and his son B — SP9, proceeded to the coffee shop on a motorcycle.

[6] According to SP8, on arrival at the coffee shop, there were about two or three persons at the coffee shop having their food and drinks. At the coffee shop, on the same table, SP8 sat together with the deceased, SP9 and the C accused. The seating arrangements were in this order. The accused sat on her right while the deceased sat on her left. SP9 sat in front of SP8 across the table.

D **[7]** And according to SP8, when she arrived at the coffee shop, the accused was already there. While sitting at the table having her drink, SP8 saw the accused talking to the deceased but she was unsure as to what they were talking about. According to SP8, before she could ask the accused as to why he had invited her to come to the coffee shop, the accused started to slap her E hard on her cheek thrice. At that time, she was sitting on a chair and the accused was also seated. SP8 said that the accused slapped her because four months earlier she had ended her relationship with the accused. According to SP8, after she was slapped by the accused, she got up. The deceased also stood up and in so doing, he told the accused 'jangan begini'. The accused who had F also stood up by then, advanced to the deceased. At this point of time, SP8 saw the accused punching the deceased twice.

[8] Continuing with her narration of the events that occurred that night, SP8 said that at that point of time, the deceased was about ten feet away from G her while the accused was then standing facing the deceased who was also standing about two feet away from him. In short, both the accused and the deceased were facing one another. According to SP8, the accused's back was facing her. SP8 then saw the accused swinging his hand from below. She saw the accused stabbing the deceased twice. She said that when the accused H stabbed the deceased for the first time, she did not see what the accused was holding. At that time, the accused was near the deceased. Both of them were standing.

[9] After the first stab, the deceased ran to the rear and the accused gave I chase. The accused caught up with the deceased, and at this point of time, SP8 saw the accused stabbing the deceased from the back. The deceased then fell within the shop area and the accused ran away. According to SP8, when the deceased fell, the accused was still standing and she then saw the accused holding a knife in his right hand.

[10] SP8 described the shape of the knife in this way. That the knife was about ten inches long from its handle and the blade was about six inches long. The High Court requested SP8 to draw the shape of the knife on a piece of paper. She complied and that drawing was tendered in evidence as exh P25. We have since seen the drawing as per exh P25 and we are constrained to say that it is certainly a lethal weapon if used for the wrong purpose. Now, when the deceased fell, SP8 saw blood coming out from his stomach. SP8 and the deceased's brother by the name of Ng Beng Hua ('SP5') then took the deceased to the General Hospital, Kuala Terengganu. Upon arrival at the said hospital, the deceased was sent to the emergency unit. On the same date — and that would be on 16 August 2002 at about 9.50pm, SP8 lodged a police report vide Manir report No 722/2002 at the Pondok Polis, General Hospital, Kuala Terengganu. That police report was marked as exh P1. WPC 131628 Siti Nursiah bt Mohd Noor ('SP1') received that police report which was worded in this way:

> Pada jam 8.30 malam 16/8/2002 semasa saya berada di Lot 335, Sri Manir, 21200 Manir, Kuala Terengganu saya dapati kawan saya nama: Ng Weng Beng KPT: 580307–11–5261 umur: 44 tahun telah kena tikam oleh (1) (L) (c) di bahagian perutnya. Lelaki Cina yang menikam beliau dicam olehnya dengan menaiki kereta no: 7533 warna kuning. Kemudian saya membawa beliau untuk rawatan di Hospital Besar Kuala Terengganu.

[11] According to SP8, she remained at the hospital until the morning of 17 August 2002. Sometime between 4am–5am, she was informed that the deceased had passed away.

[12] SP8 was cross-examined at length by the defence counsel. This was what she said under cross-examination. She admitted that she did not mention a number of details in her police report as per exh P1 like, for instance:

(a) not naming the person who stabbed the deceased;

(b) not stating the number of times the deceased was stabbed; and

(c) not stating the weapon used by the accused to stab the deceased.

[13] In our judgment, these omissions in the police report of SP8 were insignificant. It has been said by Sohoni's commentary of the *Indian Criminal Procedure Code* (16th Ed, Vol 1, at p 750) which was adopted by the Federal Court in *Herchun Singh & Ors v Public Prosecutor* [1969] 2 MLJ 209 at p 211 that:

A The first information report is not an encyclopaedia. It is not the beginning and ending of every case. It is only a complaint to set the affairs of law and order in motion. It is only at the investigation stage that all the details can be gathered and filled up.

B **[14]** Continuing with the narration of the facts, SP8 did not agree to the following line of cross-examinations:

(a) that she did not see the accused stabbing the deceased; and

C (b) that she did not witness the stabbing incident because Teng Leong @ Teng Liong Po ('SD2') had pushed her away from the table where she was seated to another place.

[15] Nevertheless, SP8 agreed that SD2 had pushed her but it was to a D place nearer to the table where she was seated earlier. She too, agreed that after SD2 had pushed her, the said SD2 was standing in front of her. When pressed further that her view was obstructed and therefore she did not see what was happening between the accused and the deceased, she categorically replied that at that point of time, nothing had happened yet.

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[16] Still under cross-examination, SP8 agreed that the accused had slapped her three times. But she did not agree that she had taken a chair to hit the accused. SP8 stated that after lodging the police report, she was questioned by the police on two occasions and on those two occasions, she F saw the investigating officer. SP8 said that she did not draw the shape of the knife and handed it to the investigating officer. Rather, according to her, the investigating officer drew the shape of the knife relying on her description. SP8 did not agree that she did not see the knife on the day in question. She agreed that she panicked when she saw the deceased being stabbed. But that G did not prevent her from not remembering the shape of the knife held by the accused. She vividly explained that when the deceased fell, the accused remained still and that was the time when she saw the knife that was held by the accused.

H **[17]** Under cross-examination, SP8 agreed that she had been living with the accused as though they were married like husband and wife. And this was from 2000 to July 2002. She agreed that the accused gave her RM300 to RM500 every month. The contributions stopped when the accused's mother was involved in an accident. She disagreed that that was the reason why she I ended her relationship with the accused. According to SP8, she ended her relationship with the accused because of his uncaring attitude. She elaborated further. As a canteen operator, she had to go to sleep early. The accused commented that if she wanted to sleep early, she should go back to her house. And whenever she told the accused that she was hungry, the accused replied

that he was not hungry. All these unhappy episodes happened on a number of occasions and that prompted her to end her relationship with the accused.

[18] SP8 disagreed that before the incident that night, the accused had gone to the deceased's house and saw her having lunch with the deceased.

[19] However, SP8 agreed that on that fateful night, the accused had invited her and the deceased to go to the coffee shop for discussion. Upon her arrival at the coffee shop, she agreed that she saw the accused was drinking beer and that he appeared to her to have drank too much and that his face was red. SP8 agreed that before the accused slapped her, the accused asked as to the reason for her treating him that way. SP8 disagreed that she ended her relationship with the accused because the deceased was her new boy friend. SP8 disagreed that after she ended her relationship with the accused, the latter had called her twice to resume their relationship. SP8 agreed that she told the accused that they were not compatible when the accused met her at the canteen of the Chung Hwa Wei Sen secondary school.

[20] SP8 reiterated that she saw the accused stab the deceased twice on the abdomen. But she was unable to say whether all the wounds were centred on the abdomen. She said that she saw blood coming out from the deceased's abdomen and buttock. She agreed that before the deceased was brought to the emergency ward of the General Hospital, Kuala Terengganu, he was still conscious.

[21] When SP8 was re-examined by the prosecution she said that when she was living together with the accused from 2000 to July 2002, they were staying in her own house. No other person was staying in her house at that time apart from the two of them.

[22] SP8 explained, under re-examination, that she had ended her relationship with the accused about six months prior to the incident in the coffee shop. She said that the accused knew that she had ended her relationship with him and that he was sad. And when she ended her relationship with the accused, he was not angry and there was no quarrel between them. They ended their relationship in an amicable manner. No tantrums, no fanfares.

[23] Of pertinence would be the admission of SP8, under re-examination, that the accused was her lover and that the deceased too, was her lover.

[24] Back to the scene of the crime, SP8 explained that there were five persons who were seated at the same table including herself. She explained that SD2 was seated in front of her. And when the accused slapped her twice,

she was still seated on a chair. Then she got up and the accused slapped her once again. At that point of time, the accused was also standing, SD2 then pushed SP8 and stood in front of her in order to prevent her from being slapped again by the accused. SP8 explained that SD2 stood between her and the accused for only a short while. She also explained that SD2 did not block her view and she saw that the accused stabbed the deceased.

[25] Again, under re-examination, SP8 said that she did not at any time have lunch with the deceased in her house. When the accused asked SP8 as to why she had treated him that way before slapping her, she replied that since their relationship had ended there was nothing more to say.

[26] Thus far, we have the evidence of SP8 who saw the accused stab the deceased and who was able to describe the shape, size and length of the knife that was used to stab the deceased and who was also able to draw the shape of that knife as per exh P25. SP8 was certainly able to identify both the accused and the deceased because they were her ex-lovers.

[27] Another eyewitness called by the prosecution was SP9. He testified that his father — the deceased, died because he was stabbed by the accused at Kedai Kopi Awang. SP9 identified Chew Let Hing as 'Awang'. SP9 explained that the incident took place at about 8.00pm and that he had known the accused for quite sometime before the incident. SP9 clarified that he did not see the accused stabbing the deceased but he saw the accused withdrawing the knife from the deceased's stomach. And at that time, both the accused and the deceased were standing about ten feet away from SP9. After seeing the accused withdrawing the knife from the deceased's stomach, SP9 left the coffee shop to inform his uncle — SP5.

[28] SP9 gave the reason as to why he went to the coffee shop that fateful night. That night at about 8.00pm, while he and the deceased were having their meal at the house, the accused came and invited the deceased to go to the coffee shop. SP9 accompanied the deceased and together they went to the coffee shop on a motorcycle. On arrival at the coffee shop, SP9 and the deceased sat at the same table with the accused and SP8. According to SP9, when he and the deceased arrived at the coffee shop, the accused was already seated at the table. At that time, the accused was drinking beer. And shortly after that, SP8 arrived at the coffee shop and sat together with them at the same table. SP9 heard SP8 speak to the accused. According to SP9, both SP8 and the accused spoke to one another loudly. SP9 said that he saw the accused slapped SP8's face. Next, SP9 saw the accused advancing towards the deceased and he saw both of them fighting. Later, SP9 saw that the deceased's stomach was bleeding. SP9 categorically said that he saw blood when the

accused withdrew the knife from the deceased's stomach. And SP9 even said that the accused held the knife in his right hand.

[29] When he was cross-examined, SP9 said that he could not remember how many times SP8 was slapped by the accused. But SP9 agreed that after SP8 was slapped by the accused, SP8 was pushed to another place in the coffee shop by SD2 and SP9 marked that place as 'Y' in the photograph P3I. At that time, SP9 was at the entrance of the coffee shop.

[30] Still under cross-examination, SP9 said that he saw the accused and the deceased quarrelling and fighting with one another. SP9 did not see that the deceased was pushing the accused until the latter nearly fell. However, SP9 agreed that when both the accused and the deceased were fighting, he saw the accused withdrawing the knife out from the deceased's stomach. SP9 also agreed that soon after SP8 was slapped by the accused, the accused and the deceased started fighting.

[31] The aggressor seems to be the accused. This piece of evidence was elicited when SP9 was being re-examined by the prosecution. SP9 testified that it was the accused who punched the deceased first.

[32] Another witness called by the prosecution was the deceased's brother — SP5. He rushed to the scene when told by SP9 that the deceased had been stabbed. Upon arrival, he saw the deceased was lying on the floor. The deceased was still alive then. He saw blood coming out from the deceased's body. He said that the deceased asked to be sent to the hospital as soon as possible because the deceased said he was in severe pain. Accompanied by SP8, the deceased was sent to the Kuala Terengganu General Hospital by SP5 and was admitted into the emergency ward. At dawn, on the next day, the deceased passed away.

[33] An important witness for the prosecution would be Dr Ahmad Hafidz bin Abu Hassan ('SP4'). He obtained the degree of Medical Bachelor and Bachelor in Chirurgae ('MBBCH') from the Royal College of Surgeon Dublin, Ireland in 1991. From March 1992 until January 2003, he served the government as a medical officer. In March 2003, he started his own clinic known as Klinik Tawakkal. When he was a government doctor, he was attached to the department of general surgery at Kuala Terengganu General Hospital from 1999–2003. He admitted that he never gave evidence in the High Court previously but he used to give evidence in the sessions court as well as in the magistrates court involving fatal accident cases.

[34] SP4 testified as follows. That on 16 August 2002 at about 9.00pm while he was on duty at the Kuala Terengganu General Hospital, he attended

to the deceased at the emergency ward. SP4, without further ado, proceeded to treat the deceased and tried to save his life. SP4 found that:

(a) the deceased was bleeding from his chest, abdomen and thigh;

(b) the deceased suffered from excessive loss of blood, with slow pulse and low blood pressure and the injuries sustained by the deceased were serious; and

(c) the deceased used his hand to indicate that he was suffering severe pain at his abdomen.

[35] SP4 reported to his head of department, one Dr Hussin bin Mohamed that the condition of the deceased had not improved much. SP4 said that Dr Hussin then directed that an emergency surgery be performed on the deceased. SP4 took the following steps to assist the deceased:

(a) arranged for blood transfusion; and

(b) prescribed and gave antibiotics and pain killers.

[36] On 16 August 2002 at 10.45pm, surgery was performed on the deceased and it ended on 17 August 2002 at about 1.40am. The surgery was conducted by Dr Hussin. And SP4 was present during the operation.

[37] What transpired in the operating theatre in the course of the surgery was narrated by SP4. This was what SP4 said:

(a) that surgery was done on the abdomen to ascertain the severity of the injuries;

(b) there was internal bleeding in the abdomen;

(c) there was a stab wound on the abdomen about 2cm in diameter;

(d) there was a wound on the small intestines;

(e) there were wounds on the right as well as the left lower chest;

(f) the wound on the left lower chest was deep and it continued into the lungs as well as to the abdomen;

(g) there was a wound on the left lower abdomen;

(h) the wound on the back of the left buttock had penetrated into the abdomen;

(i) the internal bleeding caused by the wound on the left buttock had pierced into the abdomen as well as the wound on the left lower chest

which penetrated the chest and the abdomen and the wound on the lower abdomen contributed to the presence of about 3–4 litres of blood in the abdomen;

(j) the condition of the deceased was not stable, there was excessive internal bleeding and hence surgery was performed to minimise the bleeding;

(k) to minimise the bleeding, four abdominal packs were placed in the abdomen and ten gauzes too were placed in the buttock; and

(l) all the other wounds were sutured.

[38] According to SP4, after completion of the emergency surgery, the deceased was transferred to the intensive care unit but, unfortunately, his condition deteriorated and he passed away at about 3.40am on 17 August 2002. According to SP4, he was present when the deceased died. Dr Zahari Noor ('SP7') conducted the post-mortem on the deceased at about 1.30pm on 18 August 2002 and SP4 was present when the post-mortem was done.

[39] Under cross-examination, SP4 agreed that the main cause of death of the deceased was hypovolaemic shock. SP4 also agreed that hypovolaemic shock could probably be cured by immediate operation. SP4 also agreed that excessive bleeding from the injuries on the buttock as per photograph 'P4K' could possibly be cured by immediate operation. SP4 disagreed that the injuries on the abdomen, buttock and the lower chest were not that serious to cause immediate death. According to SP4, these injuries were very serious.

[40] On re-examination by the prosecution, SP4 said that immediate operation was performed on the deceased but he could not be saved because the injuries on the buttock, lower pelvis and the abdomen were serious and difficult to control. SP4 added that the deceased's condition was not so stable.

[41] SP7, another witness called by the prosecution, testified that he performed the post-mortem on the deceased. As the head of the forensic department and consultant forensic expert attached to the Tengku Ampuan Afzan Hospital, Kuantan, Pahang, he had performed autopsies in more than 2,000 cases. He obtained his degree in medicine ('MD') from Universiti Sains Malaysia, Penang in 1987. In 1994, he obtained a diploma in legal medicine ('DLM') from the University of Sheffield, United Kingdom. In 1995, he obtained a diploma in medical jurisprudence ('DMJ') in forensic pathology from London. In 1995, he obtained a masters in medical science in forensics from the University of Sheffield, United Kingdom.

[42] SP7 joined the government service as a medical officer in 1987. Since 1996, he became a forensic expert. He has given evidence mostly in the High

Courts in homicide and sudden death cases. Since 2000, he had to deal with forensic cases from Pahang, Terengganu and Kelantan.

[43] SP7 testified that on 18 August 2002 at about 1.30pm he performed a post-mortem on the deceased at the Kuala Terengganu General Hospital. According to SP7, SP4 and the investigating officer of the case Chief Inspector Raja Mustapha bin Raja Ismail ('SP10') were present when the post-mortem was conducted.

[44] This was what SP7 said of the post-mortem which he performed:

(a) that the deceased sustained four external injuries;

(b) that the first injury was a stab wound on the front right lower chest about 2cm from the sternum and the length of the wound was about 2.5cm;

(c) that the second injury was also a stab wound, approximately 2.5cm in length on the left lower chest, about 29cm from the left shoulder;

(d) that the third injury was also a stab wound measuring 2.2cm x 1.5cm on the left side of the abdomen particularly on the iliac fossa; and

(e) that the fouth injury was also a stab wound on the back of the buttock more to the left measuring 9cm x 2cm and this wound was lengthened by the surgical procedure at the Kuala Terengganu General Hospital.

[45] SP7 then testified as to the result and his findings in regard to the internal examination of the deceased were as follows:

(a) that the first injury did not penetrate into the chest;

(b) that the second injury had penetrated into the left hemidiaphrogram (relating to the part that separated the chest cavity and the abdominal cavity) and it had also penetrated into the greater curvature thereby resulting in a wound about 1cm in length;

(c) that the second injury had penetrated 5cm into the abdomen;

(d) that the third injury had penetrated into the abdomen but the internal organ was not injured;

(e) that the fourth injury had resulted in part of the pubic ramus bone being cut;

(f) that the stab wound which had caused the fourth injury was from the back on the left; and

(g) that the fourth injury had cut the main artery known as the iliac artery on the left and the depth of the stab wound was 7cm from outside.

[46] According to SP7, the cause of death of the deceased was due to excessive loss of blood which caused him to suffer from hypovolaemic shock. And according to SP7, the excessive loss of blood was caused by the cut of the internal iliac artery. SP7 was also of the view that the second injury had caused loss of blood because of the wound in the abdomen. The cause of death of the deceased was certified by SP7 to be hypovolaemic shock because of the cut to the internal iliac artery by a sharp weapon.

[47] In regard to the fourth injury, SP7 gave two possible positions of the deceased at the time when the fourth injury was inflicted. The first possibility was when the deceased was standing with his back facing the assailant. This version would certainly be in accord with the version of SP8. Whereas the second possibility was that the deceased was lying on the ground with his face downwards or that the deceased was lying on his right side with his left side facing upwards.

[48] According to SP7, the first, second and the third injuries were wounds that were inflicted on the deceased when the deceased was facing the assailant. SP7 was of the opinion that all the injuries on the deceased were in the nature of stab wounds and they were caused by a sharp weapon such as a knife or a *golok*. Of pertinence would be the assertion of SP7 that he did not find any self-inflicted wound or defensive wound. SP7 believed, by looking at the wounds, that the deceased was trying to evade the stabs inflicted by the assailant.

[49] SP7 also said that the first and the fourth injuries could in the ordinary circumstances cause death. He emphasised that the fourth injury was fatal because the main artery was cut. He categorically stated that if the main artery was cut, blood wound simply gush out.

[50] Under cross-examination, SP7 said that excessive bleeding could be stopped by an immediate operation. But that would depend on how long and how serious the bleeding had occurred from the time the wounds were inflicted to the time the deceased was brought to the hospital. In the context of the present case, SP7 was of the view that the injury caused to the artery had resulted in too much loss of blood and that even though treatment was given by the hospital, the effect of the excessive loss of blood was sufficient to cause the deceased's death.

[51] When SP7 was re-examined by the prosecution, he was unable to give the exact time that it would take for the deceased to reach the level of hypovolaemic shock after the wound was inflicted on the deceased. But by looking at the fourth injury, SP7 was of the view that the deceased would suffer hypovolaemic shock in a matter of minutes.

[52] We pause here in order to make certain observations. A qualified expert witness is entitled to state his opinion on a matter where his expertise is relied upon and he possesses that kind of expertise. It cannot be denied that in some cases, the tribunal of fact, in the absence of an opinion evidence from an expert, may be unable to properly reach a just conclusion. The reason as to why an expert opinion evidence is admitted is simple. It is because certain inferences to be drawn calls for an expertise which the tribunal of fact does not possess.

[53] We treat both SP4 and SP7 as expert medical witnesses. They are certainly qualified to give evidence which calls for their expertise. Thus, in *Thomas Mason* (1911–12) 7 Cr App R 67 (CA) for instance, a surgeon was asked for his opinion whether a person died in consequence of his wounds and whether they could have been self-inflicted.

[54] It is entirely up to the tribunal of fact to attach any weight to the opinion evidence of an expert. In a case concerning voice identification, Lord President Cooper in *Davie v Magistrates of Edinburgh* 1953 SC 34 at p 40 aptly said that the duty of experts 'is to furnish the judge or jury with the necessary scientific criteria for testing the accuracy of their conclusions, so as to enable the judge or jury to form their own independent judgment by the application of these criteria to the facts proved in evidence'. We are of the considered view that the speech of Lord President Cooper is of universal application and it should be applied vigorously to the facts of the present appeal.

[55] The decision is entirely a matter for the tribunal of fact to decide and determine. In *Stevens (formerly Ludlow) v Simons & Ors* [1988] CLY 1161 (CA), the fact that an agreed medical report contained an opinion that symptoms suffered by the plaintiff were not attributable to injuries sustained in an accident, did not prevent the judge, after having read the reports and heard the evidence, from concluding that such symptoms were so attributable.

[56] The High Court was entitled to accept the evidence of SP7 as an expert medical witness and had the advantage of seeing the demeanour of this witness. This court should refrain from interfering with the judge's findings. The English Court of Appeal in *Joyce v Yeomans* [1981] 1 WLR 549 (CA), held that in the case of evidence given by experts, the trial judge, who had observed the demeanour of the witnesses, was in a significantly better position than the appellate court to assess the value of the evidence given, and accordingly the appellate court should be slow to interfere with the judge's findings.

[57] The tribunal of fact must form its own opinion on the evidence given by the expert. In *Wong Swee Chin v Public Prosecutor* [1981] 1 MLJ 212 at p 214, Raja Azlan Shah CJ (Malaya) (as His Royal Highness then was) aptly said:

> But, except on purely scientific issues, expert evidence is to be used by the court for the purpose of assisting rather than compelling the formulation of the ultimate judgments. In the ultimate analysis it is the tribunal of fact, whether it be a judge or jury, which is required to weigh all the evidence and determine the probabilities. It cannot transfer this task to the expert witness, the court must come to its own opinion.

[58] Here, the High Court has done just that and we endorse the approach adopted by the High Court.

[59] The reception of expert evidence is governed by s 45 of the Evidence Act 1950. It sets out the situations in which expert opinion evidence is admissible. An expert evidence is based on his training and experience. Expert witnesses have the advantage over lay witnesses by virtue of their particular skill or training. This enables the experts to form opinions and to draw inferences from observed facts and it would also enable them to identify facts which may be obscure or invisible to a lay witness. An expert witness just like a witness of fact has to give evidence on oath and he may be cross-examined on it. However, the expert must give evidence of his qualifications so that the court will be able to consider his opinion evidence.

[60] Phipson on *Evidence* (11th Ed) at para 1285 carries the following passage:

> The competency of the expert is a preliminary question for the judge and is one upon which, in practice considerable laxity prevails. Though the expert must be 'skilled', by special study or experience, the fact that he has not acquired his knowledge professionally goes merely to weight and not to admissibility.

[61] What Hashim J said in *Wong Chop Saow v Public Prosecutor* [1965] 1 MLJ 247, is rather apt:

> May I, with respect, suggest that to avoid confusion the expert witness should give his evidence as follows. He should first state his qualifications as an expert. He should then state that he has given evidence as an expert in such cases and that his evidence has been accepted by the courts.

[62] Cases like *Metropolitan Properties Co (FGC) Ltd v Lannon & Ors; R v London Rent Assessment Panel Committee ex parte Metropolitan Properties Co (FGC) Ltd* [1968] 1 All ER 354; *R v Lanfear* [1968] 1 All ER 683 (CA); *R*

v Hipson (1969) 112 Sol J 945 (CA); *R v Smith (John)* [1974] 1 All ER 376 (CA); and *Joseph Crosfield & Sons Ltd Techno-Chemical Laboratories Ltd* (1913) 29 TLR 378 , all laid down one singular principle of law. It is this. That the experts merely give evidence and they do not decide the issue.

[63] The best course to adopt is this. Just put such facts to the experts hypothetically (*Fenwick v Bell* (1844) 174 ER; 1 Carr & Kir 312 ; *Malton v Nesbit & Anor* (1824) 171 ER 1106; 1 C & P 70; *Reg v Frances* (1850–51) 4 Coxs CC 57; *Rex v John Wright* (1821) 168 ER 895; Russ & Ry 456; and *Rex v Searle* (1831) 174 ER; 1 Mood & R 75) and then ask the experts to assume one or more of them to be true, and the experts must state their opinions thereto. Here, SP7 gave his opinion that when the main artery of the deceased was cut, blood gushed out causing the deceased to lose excessive blood which ultimately led to his death. The good doctor was of the opinion that in a matter of minutes the deceased would suffer hypovolaemic shock. Once the main artery was cut that would be the end of the road for the deceased.

[64] Reverting back to the facts of the case, SP10 arrested the accused on 16 August 2002 at about 11.30pm at Kampong Tiong, Kuala Terengganu. SP10 also drew the sketch plan of the scene of the crime as per exhs P26 and P26K. SP10 confirmed that at about 1.30pm on 18 August 2002 he attended the post-mortem conducted by SP7 on the deceased at the mortuary of the Kuala Terengganu Hospital. The body of the deceased was identified by the deceased's brother by the name of Ng Weng Kong ('SP6').

[65] After a careful deliberation, the High Court found that the prosecution has succeeded in proving a prima facie case against the accused and called upon the accused to enter his defence.

[66] In his defence, this was what the accused said on oath. That he was a tile and mosaic layer earning RM72 a day. He knew SP8 since the end of 1999. In the year 2000, he lived together as husband and wife for two years with SP8. He gave between RM400 to RM500 per month to SP8 during the two years they were living together. He separated from SP8 after a quarrel. He left for Kuala Lumpur when his mother died in May 2002.

[67] On 15 August 2002, SP8 telephoned him and told him that she was involved with the deceased. They both quarrelled during that telephone conversation because SP8 alleged that he had said nasty things about the deceased which he denied. At that time he did not know the intimate relationship between the deceased and SP8.

[68] He was scolded by SP8 when he wanted to resume his relationship with her. He said that he still loved SP8.

[69] In regard to the events that happened on the day of the incident, this was what he said. That on 16 August 2002, while having lunch at the hawker's stall he also drank beer with four of his friends. He said that he drank seven to eight big bottles of beer and stout until after 4pm but before 4.30pm. He said that he was drunk. He then went home and slept for one hour. He woke up and felt giddy. He then had a bath. He felt hungry. And so at about 6pm of the same day, he went back to the hawker's centre. There he ordered food and a big bottle of Carlsberg. He said he was still feeling giddy. He said that while he was having his drink, the deceased's brother by the name of Ng Eng Kee together with SD2 came and joined him. He then ordered three more big bottles of beer (three bottles of Carlsberg). The three of them drank the beer until about 7pm. He said that between 6pm to about 7pm, he alone drank about 1 1/2 big bottles of beer. He said that at about 7pm he felt that he was drunk. He said that SD2 had stopped drinking and he then obtained a lift in SD2's car in order to go to SP8's house. He said that he wanted to look for SP8 in order to talk to her about their problem. He said that he did not meet her in her house. And so he went to the house next door and inquired from SP8's neighbour whether he had seen SP8 or not. He was told that SP8 had gone out for dinner.

[70] He then went to look for the deceased at the deceased's house. He walked into the deceased's house and saw SP8 and the deceased having dinner together. He told both SP8 and the deceased that he had something to tell them and he requested them to come to the nearby coffee shop for dinner.

[71] At the coffee shop, he ordered a small bottle of Carlsberg and he drank it. He was alone at that time. The deceased then arrived alone. He asked the deceased why SP8 did not come. The deceased then left the coffee shop to fetch SP8.

[72] At about 8pm of the same day, the deceased and SP8 arrived at the coffee shop. He said that by then he had drank two small bottles of beer. He said that he was drunk by then.

[73] He spoke to SP8 but he was scolded by her. SP8 refused to speak to the accused as he was drunk. He told SP8 that he was drinking liquor because he was depressed. Both he and SP8 quarrelled. He slapped SP8 several times. He said that SP8 took a chair and wanted to fling at him but was restrained by SD2.

A **[74]** He said that he asked the deceased as to why the deceased could do such a thing as they were friends. A fight then broke out between both of them. The accused said that the deceased punched him on his head using both the deceased's hands. He said that he did not know how many times the deceased punched him because at that time he was drunk. He said that when
B the deceased punched him, he fell to his right side at the place where drinks were prepared. He said that the deceased then closed in and choked him with the deceased's hands. He then said that he grabbed whatever he could with his hand at that time and he then pushed the deceased away. He saw blood and he then ran away. He saw the deceased holding onto the deceased's
C stomach with both hands and there was blood. He said that he was drunk and was frightened and he was unable to say what had happened to the thing ('benda') which he grabbed with his hand.

D **[75]** That briefly was the defence of the accused. SD2 was called by the accused to support the accused's story. Unfortunately, the prosecution impeached SD2 and his evidence was rejected by the High Court.

ANALYSIS

E **[76]** Murder is defined in s 300 of the Penal Code. That section reads as follows:

> Except in the cases hereinafter excepted, culpable homicide is murder —
>
> F (a) if the act by which the death is caused is done with the intention of causing death;
>
> (b) if it is done with the intention of causing such bodily injury as the offender knows to be likely to cause the death of the person to whom the harm is caused;
>
> G (c) if it is done with the intention of causing bodily injury to any person, and the bodily injury intended to be inflicted is sufficient in the ordinary course of nature to cause death; or
>
> H (d) if the person committing the act knows that it is so imminently dangerous that it must in all probability cause death, or such bodily injury as is likely to cause death, and commits such act without any excuse for incurring the risk of causing death, or such injury as aforesaid.

I **[77]** Killing with the intention to kill is the classic example of murder and it is set out in s 300(a) of the Penal Code. While s 300(b) of the Penal Code attracts liability for murder where the accused person intends to inflict a bodily injury and he knows that death is likely to happen. Illustration (b) to

s 300 of the Penal Code envisages the situation which is most likely to be covered by s 300(b) of the Penal Code where 'the offender knows that the particular person injured is likely, either from peculiarity of constitution, or immature age, or other special circumstance, to be killed by an injury which would not ordinarily cause death' (*Reg v Govinda* [1876–77] ILR 1 Bombay 342; and *Anda v State of Rajasthan* AIR 1966 SC 148). In the context of the present appeal, s 300(b) of the Penal Code does not apply.

[78] Section 300(c) of the Penal Code applies in the instant appeal. It states that the accused intended to cause bodily injury and that 'the bodily injury intended to be inflicted is sufficient in the ordinary course of nature to cause death'. We would gratefully apply the test laid down by V Bose J in *Virsa Singh v State of Punjab* AIR 1958 SC 465 at p 467, and there His Lordship said:

> In considering whether the intention was to inflict the injury found to have been inflicted, the enquiry necessarily proceeds on broad lines as, for example, whether there was an intention to strike at a vital or a dangerous spot, and whether with sufficient force to cause the kind of injury found to have been inflicted. It is, of course, not necessary to enquire into every last detail as, for instance, whether the prisoner intended to have the bowels fall out, or whether he intended to penetrate the liver or the kidneys or the heart. Otherwise, a man who has no knowledge of anatomy could never be convicted, for, if he does not know that there is a heart or a kidney or bowels, he cannot be said to have intended to injure them. Of course, that is not the kind of enquiry. It is broad-based and simple and based on commonsense: the kind of enquiry that 'twelve good men and true' could readily appreciate and understand.

[79] The essential elements necessary to satisfy s 300(c) of the Penal Code are set out in *Virsa Singh v State of Punjab*. There V Bose J said at p 467 of the report:

> First, it must establish, quite objectively, that a bodily injury is present;
>
> Secondly, the nature of the injury must be proved; these are purely objective investigations;
>
> Thirdly, it must be proved that there was an intention to inflict that particular bodily injury, that is to say, that it was not accidental or unintentional, or that some other kind of injury was intended;
>
> Once these three elements are proved to be present, the enquiry proceeds further; and
>
> Fourthly, it must be proved that the injury of the type just described made up of the three elements set out above is sufficient to cause death in the ordinary course of nature. This part of the enquiry is purely objective and inferential and has nothing to do with the intention of the offender.

> Once these four elements are established by the prosecution (and, of course, the burden is on the prosecution throughout) the offence is murder under s 300 'thirdly'. It does not matter that there was no intention to cause death. It does not matter that there was no intention even to cause an injury of a kind that is sufficient to cause death in the ordinary course of nature (not that there is any real distinction between the two). It does not even matter that there is no knowledge that an act of that kind will be likely to cause death. Once the intention to cause the bodily injury actually found to be present is proved, the rest of the enquiry is purely objective and the only question is whether, as a matter of purely objective inference, the injury is sufficient in the ordinary course of nature to cause death. No one has a licence to run around inflicting injuries that are sufficient to cause death in the ordinary course of nature and claim that they are not guilty of murder. If they inflict injuries of that kind, they must face the consequences; and they can only escape if it can be shown, or reasonably deduced, that the injury was accidental or otherwise unintentional.

[80] Section 300(d) of the Penal Code is based on knowledge rather than intention. It has two distinct clauses. The first clause requires proof that the accused knew that the act was so imminently dangerous that it must in all probability cause death. While the second clause of s 300(d) of the Penal Code makes reference to the accused knowing that the act was so imminently dangerous that it must in all probability cause a bodily injury that was likely to cause death. Illustration (d) to s 300 of the Penal Code makes reference to a situation where the accused has fired 'a loaded canon into a crowd of persons and kills one of them'; it enacts that 'A' is guilty of murder, although he may not have had a premeditated design to kill any particular individual'. Kang Hwee Gee J (now JCA) in *Public Prosecutor v Mahfar bin Sairan* [2000] 4 MLJ 791 at pp 803–804, aptly said that illustration (d) to s 300 of the Penal Code 'could be interpreted to include the doing of an act to an individual (as in the case of the deceased) murder still cannot be committed under this provision; for although it does not speak of intention as in the other three provisions, the prosecution must still prove that the accused knew that his act of moving the car forward in the way he did was so imminently dangerous'.

[81] Now, from the evidence of SP4 and SP7 which we have earlier set out in some detail, the presence of those bodily injuries on the deceased and the nature of those injuries must surely satisfy the first and the second elements of s 300(c) of the Penal Code as set out by V Bose J in *Virsa Singh v State of Punjab*. This meant that the prosecution had succeeded in establishing these two elements.

[82] The third element of s 300(c) of the Penal Code expounded by V Bose J in *Virsa Singh v State of Punjab*, requires proof that there was an intention to inflict that particular bodily injuries on the deceased — whether

or not it was not accidental or unintentional. This is where the test laid down by V Bose J in *Virsa Singh v State of Punjab* as reproduced earlier plays a prominent part. And the evidence of SP8, SP9 and SP7 as reproduced earlier would provide the necessary answer. A narration of the pertinent facts must be made here, once again. SP8's evidence proved that the aggressor was the accused. According to SP8 it was the accused who had approached the deceased and punched the deceased twice. The accused then stabbed the deceased. At that point of time, the accused was facing the deceased and they were about two feet apart. The stabs inflicted by the accused must have landed on the front part of the deceased's body particularly at the chest and the abdomen. And this was confirmed by SP7. According to the good doctor — SP7, the first, the second and the third stab wounds were all located at the front part of the deceased's body.

[83] According to SP8, the deceased ran to the rear after being stabbed. The accused gave chase and caught up with the deceased. It was at this point of time that the accused stabbed the deceased from the back. We agree with the High Court that this constituted the fourth stab wound which was located on the back of the deceased's left buttock. And according to SP7, the stab wound had penetrated about 7cm inwards causing part of the pubic ramus bone and the main artery known medically as the internal iliac artery on the left to be cut thereby causing excessive bleeding which gave rise to hypovolaemic shock leading to the death of the deceased.

[84] In our judgment, on the evidence, there is no doubt that the accused had intended to inflict the injuries found on the deceased's body. We were satisfied, based on the evidence of SP7, that the second stab wound and the fourth stab wound inflicted on the deceased were sufficient in the ordinary course of nature to cause death. In our judgment, we are satisfied that the prosecution had proved that the act of the accused which caused the death of the deceased was done with the intention of causing bodily injuries on the deceased which were sufficient in the ordinary course of nature to cause death within the meaning of s 300(c) of the Penal Code.

[85] The written judgment of the High Court was impeccable: a model of precision and comprehensiveness and we cannot find any fault with it. The serious injuries suffered by the deceased particularly with the severance of the main artery, was ample evidence of an intention to kill.

[86] The defences of intoxication, provocation and sudden fight were considered by the High Court. We will now make reference to these defences.

[87] By raising the defence of intoxication, the accused was saying that he was in a state of intoxication which precluded him from forming the specific

intent to kill (*Tan Hung Song v Rex* [1951] MLJ 181). Of course, intoxication can certainly affect the criminal responsibility of the accused. It could result in a complete acquittal or the charge of murder may be reduced to culpable homicide not amounting to murder. But, there are times, where the courts would totally disregard the accused's intoxication and convict him or her of the murder charge. Absent the fault element of a crime like intention or knowledge while under the influence of liquor would impair the criminal liability of an accused person. The effects of intoxication can be momentary or transient or long lasting.

[88] The defence of intoxication is stipulated in ss 85 and 86 of the Penal Code.

[89] Section 85 of the Penal Code reads as follows:

> Intoxication when a defence
>
> 85
>
> (1) Save as provided in this section and in section 86, intoxication shall not constitute a defence to any criminal charge.
>
> (2) Intoxication shall be a defence to any criminal charge if by reason thereof the person charged at the time of the act or omission complained of did not know that such act or omission was wrong or did not know what he was doing and —
>
> (a) the state of intoxication was caused without his consent by the malicious or negligent act of another person; or
>
> (b) the person charged was by reason of intoxication insane, temporarily or otherwise, at the time of such act or omission.

[90] While s 86 of the Penal Code is worded in this way:

> 86 Effect of defence of intoxication when established
>
> (1) Where the defence under subsection 85(2) is established, then in a case falling under paragraph (a) thereof the accused person shall be acquitted, and in a case falling under paragraph (b), the provisions of section 84 of this Code, sections 347 and 348 of the Criminal Procedure Code (Act 593) shall apply.
>
> (2) Intoxication shall be taken into account for the purpose of determining whether the person charged had formed any intention, specific or otherwise, in the absence of which he would not be guilty of the offence.

(3) For the purpose of this and the preceding section 'intoxication' shall be deemed to include a state produced by narcotics or drugs.

[91] Involuntary intoxication under s 85(2)(a) of the Penal Code and intoxication negating intention under s 86(2) of the Penal Code operate as a defence to any criminal charge.

[92] Now, the defence of intoxication requires the accused to prove that the intoxication was caused without his consent by the malicious or negligent conduct of a third party. And the intoxication too must have been sufficiently severe to cause the accused not to know that the alleged criminal conduct 'was wrong or did not know what he was doing'.

[93] Clauses (a) and (b) of s 85(2) of the Penal Code share the same requirement and that would be that the intoxicated condition must have caused the accused not to know that the conduct was wrong or what he was doing. It is to be noted that the concept of 'insanity' appearing in s 85(2)(b) of the Penal Code is identical to 'unsoundness of mind' under s 84 of the Penal Code.

[94] We must categorically say that where the accused formed the intention required for an offence prior to becoming intoxicated, s 86(2) of the Penal Code cannot be invoked. And that while intoxication may have negated the requisite intention when the crime was committed, the defence under s 86(2) of the Penal Code would be denied to the accused who had the intention prior to that time.

[95] It is helpful to secure scientific evidence in the form of blood and urine analysis in order to prove intoxication but such a requirement is not essential at all. And this has been the stand of the Federal Court in *Francis Antonysamy v Public Prosecutor* [2005] 3 MLJ 389 at p 413; [2005] 2 CLJ 481 at p 509:

> It must be observed that what is in issue in a defence of intoxication is the state of mind of the person concerned in order to determine whether he could have formed the necessary intention. The best evidence to establish his state of mind is his conduct prior to, at the time of, and after the offence as different people react differently to the same blood alcohol level. Needless to say scientific evidence is significant to explain the conduct of the person. In other words it will corroborate the evidence of conduct. Its absence cannot therefore be fatal.

[96] It goes without saying that in determining to what extent the accused's state of mind was affected by intoxication, inferences from the known relevant facts and the totality of the surrounding circumstances, including his

behaviour before, during and after the alleged offence would constitute relevant considerations (*Kenneth Fook Mun Lee v Public Prosecutor* [2007] 2 MLJ 130; [2006] 4 CLJ 359 (FC)).

[97] Since s 86(2) of the Penal Code is a true defence, the burden lies on the accused to prove it on the balance of probabilities (*Francis Antonysamy v Public Prosecutor*; *Juma'at bin Samad v Public Prosecutor* [1993] 3 SLR 338; *Suradet & Ors v Public Prosecutor* [1993] 3 SLR 265; and *Indra Wijaya Ibrahim v Public Prosecutor* [1995] 2 SLR 442).

[98] With these legal principles in mind we will now examine the available evidence. It must be recalled that the accused admitted that he was drunk because of the beer and stout which he had consumed voluntarily. That being the case, s 85(2)(a) of the Penal Code cannot be invoked in favour of the accused.

[99] Now, in order to determine whether s 85(2)(b) of the Penal Code applies one must consider whether at the time of the commission of the offence, the accused was by reason of intoxication, rendered insane, temporarily or otherwise. And if the court is satisfied, on the balance of probabilities, that the accused was in such a state of mind, then the accused will be entitled to a special acquittal by reason of insanity. In such a situation, the accused would not be immediately released. Rather, the accused would be dealt with under s 84 of the Penal Code and ss 347 and 348 of the Criminal Procedure Code.

[100] The pertinent questions to pose would be this. Whether the accused was intoxicated at the time of the commission of the offence? And if he was intoxicated, whether by reason of the intoxication, he had formed any of the requisite intention to constitute an offence of murder? Of course, the burden of showing the existence of circumstances bringing the case within the ambit of s 86(2) of the Penal Code falls on the accused. And he must do that on the balance of probabilities.

[101] We must reiterate that in determining whether the defence of intoxication had been successfully raised, we have to look at the conduct of the accused immediately prior to and after the commission of the offence. In this connection, we need only mention three authorities to support our proposition: *Aladin v Public Prosecutor* [1964] MLJ 345; *Liew Koh Tai v PP* [1965] 1 MLJ 54, (FC) ; and *Public Prosecutor v Awang Raduan bin Awang Bol* [1998] 5 MLJ 460. In the context of the present appeal, the evidence of the accused himself as to what he was doing prior to, during and after the commission of the offence would indicate the true state of his mind at the material time (*Francis Antonysamy v Public Prosecutor*).

[102] Now, in his evidence, the accused said that he started drinking beer and stout at about 12pm (noon) on 16 August 2002 when he was having his lunch. Four of the accused's friends joined him and he continued drinking beer and stout until almost 4.30pm. The accused said that by then, he had consumed seven to eight big bottles of beer and stout and that he was already drunk. But we note that although the accused said that he was already drunk, he was able to recall that soon thereafter he walked back to his house at Jalan Banggol on his own. We too note that the distance between his house and the hawker's centre was between two electricity posts. The accused was able to recall that on his way home to his house he had not fallen down. Upon reaching his house, the accused remembered that he had opened the door and entered the house. The accused also recalled that he went to sleep on the sofa. The accused was also able to recall that he vomited once and that he slept until 5pm. The accused further recalled that when he got up he still had a headache. He remembered that he had a bath and after which he said that he felt slightly better. Then he said that he put on his attire and went back to the hawker's centre at about 6pm.

[103] The accused continued with his testimony in this way. That when he arrived at the hawker's centre, he ordered food and beer. He was able to recall the type of food and beer which he ordered. And that would be mixed food (makanan campuran), chicken and *tauhu* together with Carlsberg. The accused was able to recall that while having his food, SD2 and the deceased's brother by the name of Ng Eng Kee came and joined him. The accused also recalled that when SD2 and Ng Eng Kee were with him, he had consumed 1 1/2 big bottles of beer. The accused further recalled that he had a conversation with SD2 as well as with Ng Eng Kee. He remembered that Ng Eng Kee talked about the deceased. He also recalled that Ng Eng Kee said that the deceased created a lot of problems. He agreed with the prosecution that Ng Eng Kee talked about the deceased. The accused also recalled that Ng Eng Kee had told the accused that he (Ng Eng Kee) would advise the deceased. The accused also recalled that he drank liquor with Ng Eng Kee and SD2 until about 7pm. The accused was also able to recall that he had paid RM44 for the food and drink consumed that evening.

[104] The accused was even able to recall that he had obtained a lift from SD2 and travelled in the latter's car to go to Taman Sri Manir in order to look for SP8. The accused also remembered that he reached Taman Sri Manir at about 7.15pm and he alighted from SD2's motor car. He recalled proceeding to SP8's house and upon reaching SP8's house he found that the house was locked but the lights in the house were on. He recalled that he did not meet SP8 there. He then explained that he asked SP8's neighbour by the name of Ah Ngan about the whereabouts of SP8. Ah Ngan had told him that SP8 could have gone out for dinner. The accused also recalled that he went to the

deceased's house and saw SP8 and the deceased having dinner together. And he recalled that he told both of them to come to the nearby coffee shop after dinner.

[105] The accused further recalled the following events. That from the deceased's house he had gone to and arrived at the coffee shop before 8pm. He remembered ordering three small bottles of beer which he said he drank slowly. He also remembered that when the deceased came to the coffee shop, he had asked the deceased why SP8 did not come. He recalled that the deceased did not reply and he also recalled telling the deceased to ask SP8 to come to the coffee shop. The accused also recalled that the deceased left the coffee shop and came back shortly thereafter with SP8. He also recalled that SP8 and the deceased sat together with him at the same table. He even recalled minute details like SP8 sat to his left while the deceased to his right. The accused narrated that when SP8 and the deceased arrived at the coffee shop at about 8pm, he had already consumed two small bottles of beer and was drunk by then. The accused proceeded further and he said that he recalled that he had asked SP8 as to why she scolded him the day before about the deceased. He said that he could not remember what was SP8's reply because at that time he was drunk. However, he recalled that SP8 had said something. He said that although he could not recall what was said by SP8, he remembered what had happened next. He said that he uttered the following words, 'Saya mabok. Saya tampar Ah Choo'. The accused further recalled that SP8 grabbed hold of a chair and wanted to hit him with it. He then said that SD2 had intervened and had pulled SP8 to one side.

[106] The High Court meticulously set out in great detail the conduct of the accused immediately prior to and after the commission of the offence. It was a display of an excellent judicial appreciation of the evidence. We note that the accused was able to remember the finer details which he alone could tell the court. In our judgment, if the accused was intoxicated at the time of the offence as alleged in the charge to the extent that he was temporarily insane or otherwise or that the degree of intoxication was such that he could not have formed any of the intentions required to constitute the offence of murder, he would not have been able to remember and recount all the events in lucid details as described by him in his evidence (*Aladin v Public Prosecutor*).

[107] Somehow, the accused seemed unable to remember when questions were asked about the 'thing' that he said he could grab with his hand. The accused admitted running away from the scene of the crime in SD2's car. He said that he ran away because he was drunk and that he was also scared. He explained that when he saw a lot of blood he became scared.

[108] In our judgment, the accused was not intoxicated at the time of the offence to such an extent as not to know what he was doing. In our judgment, at the time of the offence, the accused was conscious of his surroundings and that he knew what he was doing and the accused was also capable of forming the intention under s 300(c) of the Penal Code to commit the offence of murder.

[109] We accordingly agree with the High Court that the accused had failed to establish on the balance of probabilities, the defence of intoxication as set out in s 85(2)(b) of the Penal Code or s 86(2) of the Penal Code.

[110] In regard to the defence of grave and sudden provocation, we have this to say. The defence of grave and sudden provocation is housed in Exception 1 to s 300 of the Penal Code which contains a main provision together with three provisos plus an explanation with several illustrations. We shall now reproduce them verbatim:

> Exception 1 — Culpable homicide is not murder if the offender, whilst deprived of the power of self control by grave and sudden provocation, causes the death of the person who gave the provocation, or causes the death of any other person by mistake or accident.
>
> The above exception is subject to the following provisos:
>
> (a) that the provocation is not sought or voluntarily provoked by the offender as an excuse for killing or doing harm to any person;
>
> (b) that the provocation is not given by anything done in obedience to the law, or by a public servant in the lawful exercise of the powers of such public servant;
>
> (c) that the provocation is not given by anything done in the lawful exercise of the right of private defence.
>
> Explanation — Whether the provocation was grave and sudden enough to prevent the offence from amounting to murder, is a question of fact.
>
> ILLUSTRATIONS
>
> (a) A, under the influence of passion excited by a provocation given by Z, intentionally kills, Y, Z's child. This is murder, inasmuch as the provocation was not given by the child, and the death of the child was not caused by accident or misfortune in doing an act caused by the provocation.
>
> (b) Y gives grave and sudden provocation to A. A, on this provocation, fires a pistol at Y, neither intending nor knowing himself to be likely to kill Z, who is near him, but out of sight. A kills Z. Here A has not committed murder, but merely culpable homicide.

(c) A is lawfully arrested by Z, a bailiff. A is excited to sudden and violent passion by the arrest, and kills Z. This is murder, inasmuch as the provocation was given by a thing done by a public servant in the exercise of his powers.

(d) A appears as a witness before Z, a Magistrate. Z says that he does not believe a word of A's deposition, and that A has perjured himself. A is moved to sudden passion by these words, and kills Z. This is murder.

(e) A attempts to pull Z's nose. Z, in the exercise of the right of private defence, lays hold of A to prevent him from doing so. A is moved to sudden and violent passion in consequence, and kills Z. This is murder, inasmuch as the provocation was given by a thing done in the exercise of the right of private defence.

(f) Z strikes B. B is by this provocation excited to violent rage. A, a bystander, intending to take advantage of B's rage, and to cause him to kill Z, puts a knife into B's hand for that purpose. B kills Z with the knife. Here B may have committed only culpable homicide, but A is guilty of murder.

[111] If the defence of grave and sudden provocation is successfully pleaded, it has the effect of reducing the offence of murder to culpable homicide not amounting to murder. But not every type of conduct will amount to provocation under the law. No matter how extreme the provocation is, the exception will not be triggered if the accused has not actually lost his or her self-control as a result of the provocation.

[112] Exception 1 to s 300 of the Penal Code stipulates that provocation has to be 'grave'. But what constitutes 'grave' is not defined and it is basically a question of fact to be decided on the facts of each particular case. The test to determine what amounts to grave provocation is by asking, according to the case of *Public Prosecutor v Abdul Razak bin Dalek* [2007] 2 MLJ 255 at p 299, this simple question, per Jeffrey Tan J (now JCA):

> A good test for deciding whether the provocation was grave or not is this: 'Is a reasonable man likely to lose self-control as a result of such provocation?'.

[113] If the answer is in the positive, then the provocation is said to be grave.

[114] What is said to be of grave provocation to one person may not be so to another. Thus, the reasonableman test would depend on so many factors such as the circumstances in which the provocation was offered, any past

conduct between the parties which may add a different complexion to the provocative episode and the relationship of the parties themselves.

[115] Exception 1 to s 300 of the Penal Code makes reference to the requirements that the provocation has to be 'sudden'. What is 'sudden' must surely be 'unexpected' and it has to occur within a short period of time before the killing (*Chong Teng v Public Prosecutor* [1960] MLJ 153; *Lorensus Tukan v Public Prosecutor* [1988] 1 MLJ 251; *Che Omar bin Mohd Akhir v Public Prosecutor* [1999] 2 MLJ 689; and *Public Prosecutor v Abdul Razak bin Dalek*). And according to Subba Rao J in *Nanavati v State of Maharashtra* AIR 1962 SC 605 at p 630:

> The fatal blow should be clearly traced to the influence of passion arising from that provocation and not after the passion had cooled down by lapse of time, or otherwise giving room and scope for premeditation and calculation.

[116] The pertinent question to pose would be, 'Whether the accused was still deprived of his power of self-control at the time of the killing?' Authorities like *Public Prosecutor v Lim Eng Kiat* [1995] 1 MLJ 625; *Lim Chin Chong v Public Prosecutor* [1998] 2 SLR 794; and *Che Omar bin Mohd Akhir v Public Prosecutor* laid down the following principle of law. And that would be this. The longer the time gap between the provocative episode and the homicidal act, the more likely that it will be construed that the accused had killed due to premeditation or revenge.

[117] Pure and simple, under Exception 1 to s 300 of the Penal Code, the defence relates to a loss of self-control brought about by the provocation. And the accused must identify the provocative incident that gave rise to a loss of self-control. And the number of wounds inflicted on the deceased may be evidence after the event to show that the accused had lost his self-control. But if the accused had not lost self-control, then the defence of grave and sudden provocation would fail.

[118] The following events were relied upon by the accused to establish provocation:

(a) SP8's act of scolding the accused on the telephone about the deceased;

(b) SP8 and the deceased having dinner together at the deceased's house on 16 August 2002 before the incident at the coffee shop; and

(c) SP8's act of trying to hit the accused with a chair.

[119] The High Court considered the events which accused relied upon in order to establish provocation and we find nothing wrong with the approach adopted by the High Court. This was what the High Court said (see pp 462–465 of the appeal record):

> I am unable to accept that any of the acts or events referred to by learned counsel and/or the combination of all or any of them were sufficient to constitute grave and sudden provocation. I find nothing in the accused's evidence to show that he was angered by any of the events. Indeed, in his own evidence, after the happening of the first two events, he said he was sad (*susah hati*), not angry or provoked. In any event, even if the cumulative effect of all the relevant events described by the accused in his evidence from the time SP8 was no longer living together with him until the time the accused saw SP8 and the deceased having dinner together, had angered and provoked the accused, there was no evidence to show that he had acted in retaliation there and then. Instead, even on his own evidence he had invited them to come to the coffee shop. So even if there was provocation at the time when the accused saw SP8 and the deceased having dinner together in the deceased's house, there was a sufficient cooling off period for him to regain his self control and composure.
>
> I also do not see how SP8's act of taking a chair (even if true) or anything that she said at the table could constitute provocation grave and sudden enough to justify the accused punching and stabbing the deceased. According to SP8's evidence, all that the deceased did after she was slapped by the accused, was to stand up and say 'jangan begini'. So there was really nothing in what the deceased did and say at the material time that could come close to provocation, let alone grave and sudden. Under cross-examination, when asked by the learned deputy public prosecutor what happened after SD2 pulled SP8 to one side, the accused said:
>
> Jawapan: Saya tanya Ah Meng sebab apa banyak hal berlaku. Pada masa itu saya dan Ah Meng berdiri. Saya tanya Ah Meng: semalam kita makan nasi bersama-sama dan saya tidak cakap apa-apa pada malam itu. Jadi kenapa Ah Choo boleh bergaduh dengan saya. Ah Meng tidak jawab apa-apa. Saya pun marah.
>
> Soalan: Kenapa awak tiba-tiba marah?
>
> Jawapan: Saya marah dia; kita sama-sama kawan bagaimana awak boleh buat banyak hal.
>
> Soalan: Hal apa yang Ah Meng buat terhadap awak?
>
> Jawapan: Hal tentang Ah Choo.
>
> Soalan: Lepas itu apa berlaku?
>
> Jawapan: Pada masa itu saya marah dia. Ah Meng tumbuk saya. Saya tidak ingat berapa kali Ah Meng tumbuk saya sebab saya mabuk.
>
> Again, even on that evidence of the accused (if accepted) all the deceased did was not saying anything. Later when the accused scolded him, the deceased punched him. Again, even if the deceased really did punch the accused, that act

of the deceased was not sufficient to justify the accused stabbing the deceased. The retaliation was clearly out of proportion to the alleged provocation. Indeed, from what the accused himself had said in evidence, his case was a case of sudden passion of anger and desire for revenge, which was not enough in law to amount to provocation.

[120] According to the evidence, 'Ah Choo' would refer to SP8.

[121] In our judgment, by virtue of s 105 of the Evidence Act 1950, the burden of establishing the defence of grave and sudden provocation lies on the accused on the balance of probabilities. And he has failed to discharge that burden.

[122] Finally, the defence of 'sudden fight' was raised by the accused. If the accused was successful in pleading this defence, he will be convicted of culpable homicide not amounting to murder. Exception 4 to s 300 of the Penal Code makes reference to this defence. It states as follows:

Exception 4 — Culpable homicide is not murder if it is committed without premeditation in a sudden fight in the heat of passion upon a sudden quarrel, and without the offender having taken undue advantage or acted in a cruel or unusual manner.

Explanation — It is immaterial in such cases which party offers the provocation or commits the first assault.

[123] The phrase 'in the heat of passion' envisages the situation where the combatants of a sudden fight have experienced some degree of lost of self-control. And the phrase 'undue advantage' gives the impression that the fight started on an equal footing between the combatants. There will be blows on each side. And each subsequent blow becomes a fresh provocation notwithstanding that only a slight blow that may have been exchanged.

[124] To bring a case within Exception 4 to s 300 of the Penal Code, the following facts must be proved:

(a) that there is a sudden fight in the heat of passion upon a sudden quarrel;

(b) that there is no premeditation; and

(c) that the offender has not taken undue advantage or acted in a cruel or unusual manner.

[125] The drafters of Exception 4 must have foreseen that in a sudden fight it is quite impossible to say which party is more guilty than the other. In a sudden fight, the fight is 'sudden' and it is not pre-planned. Thus, there

should not be an interval between the quarrel and the fight. If such interval exists, then reason would prevail. And reason would definitely overcome passion and the fight cannot be said to be sudden. Blows must be exchanged and even if such blows are avoided and do not hit the opponent, a sudden fight is said to have taken place. In *Atma Singh Kahan Singh v The State* AIR 1955 Punjab 191 at p 192, the court said:

> The term 'fight' is not defined in the Code, but everyone knows what a fight is and that it takes two to make a fight. I would agree with the argument of learned counsel for the appellant that it is not necessary that weapons should be used in a fight, and also that an affray can be a fight even if only one party in the fight is successful in landing a blow on his opponent.
>
> I would, however, hold that in order to constitute a fight it is necessary that blows should be exchanged even if they do not all find their target,...

[126] Here, a knife was used by the accused. The drawing of the knife was tendered in court as exh P25 and it was SP8 who drew the shape of the knife. The High Court considered the arguments that the knife was not tendered and rightly held that both SP8 and SP9 saw the accused holding the knife immediately after the deceased was seen collapsing on the coffee shop floor and bleeding from the stomach. We see no reason to disturb the High Court's assessment of the evidence pertaining to the knife.

[127] Here, the accused had stabbed the deceased not once but four times with a knife. The evidence revealed that after being stabbed on the front part of his body, the deceased ran but was chased by the accused. The accused caught up with the deceased and again stabbed the deceased on the back of the buttock. This was the fourth stab that had cut the pubic ramus bone and partially cut the internal iliac artery causing excessive loss of blood. Just like the High Court, we find it difficult to say that the accused had not taken undue advantage or had not acted in a cruel or unusual manner. In our judgment, the accused had taken advantage of the deceased and had acted in a cruel and unusual manner (*Public Prosecutor v Chan Kim Choi* [1989] 1 MLJ 404; and *Teo Boon Ann v Public Prosecutor* [1989] 2 MLJ 321). That being the case, the defence of sudden fight must fail.

[128] We also agree with the conclusion of the High Court that it was the accused who had caused the death of the deceased and not because of the alleged delay by the hospital in carrying out the emergency operation or because of any other reason.

CONCLUSION

[129] In our judgment, there was ample evidence before the High Court

which proved beyond a reasonable doubt that the accused had caused the death of the deceased in circumstances which amounted to murder under s 300 of the Penal Code.

[130] We have also considered the other complaints of the accused but we consider them to be insignificant and we are of the view that our determination on any of them would not have altered the conclusion which we have arrived herein.

[131] Accordingly, we dismiss the appeal and confirm the conviction and sentence imposed by the High Court.

Appeal dismissed.

Reported by Kohila Nesan